Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corp. Petition Pursuant to 47 U.S.C. Section 160(c) of the Communications Act for Forbearance of Enforcement of Section 294(a)(3) of the Communications Act, As Amended	)	WC Docket No. 03-256

COMMENTS OF SBC COMMUNICATIONS INC TO AT&T'S PETITION FOR FORBEARANCE

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SBC Communications Inc. ("SBC"), on behalf of the Pacific Bell Telephone Company, Southwestern Bell Telephone Company, The Ameritech Operating Companies, The Southern New England Telephone Company, and Nevada Bell Telephone Company (collectively "SBC"), hereby submits these comments in response to AT&T's Petition for Forbearance ("Petition") filed in the above-captioned docket.

I. INTRODUCTION AND SUMMARY

Congress passed the Telecommunications Act of 1996 for one purpose: " to promote competition and reduce regulation…"[1] in the telecommunications market. In furtherance of this goal, Congress amended Section 204(a) to add a new subsection (3) which provides that carriers may file new or revised charges on a streamlined basis, and that

> Any such charge, classification regulation or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it was filed with the Commission unless the Commission takes action under paragraph 1 before the end of that 7-day or 15-day period, as appropriate.[2]

[1] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (*Preamble)*.

[2] 47 C.F.R. sec. 204(a)(3).

In interpreting this statutory language, the Commission concluded that Congress' use of "deemed lawful" significantly changed the legal consequences of allowing tariffs filed under Section 204(a)(3) to become effective without suspension.[3] Specifically, the Commission reasoned that tariffs that take effect under Section 204(a)(3) that are later found to be unreasonable in a Section 205 and Section 208 proceeding would not subject the relevant carrier to liability for damages for services provided prior to the unlawful determination. The Commission concluded that this interpretation of "deemed lawful" was the only reasonable interpretation of that language and that it represented "the balance between consumers and carriers that Congress struck when it required eligible streamlined tariffs to be deemed lawful." The Commission affirmed this conclusion on reconsideration in 2002.[4]

In a nutshell, AT&T claims that LECs take advantage of the deemed lawful provision of Section 204(a)(3) to charge customers unreasonable rates, because customers cannot receive damages for unsuspended tariffed rates later found to be unreasonable. AT&T asks the Commission to forbear from the deemed lawful provision pursuant to Section 10 of the Act.

Before turning to the merits – or lack thereof – of AT&T's petition, SBC notes its bemusement that AT&T would even bother to file this petition, since AT&T has unilaterally decided that it does not need to pay required access charges in any event. To put an end to AT&T's egregiously lawless actions, the Commission must rule on AT&T's fifteen-month old Petition for Declaratory Ruling *without further delay*.

As for the merits of this petition, the Commission should give it short shrift. Section 10 was intended to be a tool for *deregulation,* not *increased* regulation. In asking the Commission to forbear from Section 204(a)(3), which lessens the burdens of the tariffing process on carriers subject to it, AT&T thus turns section 10 on its head. Its request is all the more frivolous given

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[3] *Implementation of Section 402(B)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, *Report and Order*, 12 FCC Rcd 2170 (1997)(*Streamlined Tariff Order*).

[4] *Implementation of Section 402(B)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, *Order on Reconsideration*, 17 FCC Rcd 17040 (2002).

that it is wholly lacking in evidentiary support. Notwithstanding its lofty rhetoric about patterns of abuse, AT&T fails to identify even one instance of such abuse. The only evidence it offers are ostensible rates of return for a handful of non price cap LECs. But wholly apart from the fact that AT&T submits no such data for price cap LECs, such as SBC, AT&T does not even attempt to link those rates of return to section 204(a)(3). Its petition is, in short, an exercise in grandstanding.

II. IT IS ANTITHETICAL TO THE UNDERLYING PURPOSE OF SECTION 10 TO USE IT TO INJECT GREATER FEDERAL OVERSIGHT INTO THE TARIFFING PROCESS. BUT EVEN IF SECTION 10 COULD BE USED AS AT&T PROPOSES, AT&T HAS FAILED TO SATISFY THE STATUTORY CRITERIA FOR FORBEARANCE.

AT&T cloaks the relief it seeks under the guise of a forbearance petition, when in fact AT&T's request is yet *another* petition for reconsideration of the Commission's *Streamlined Tariff Order*. The Commission rejected in that Order, *and* on reconsideration, AT&T's arguments that carriers with deemed lawful tariffed rates should be subject to retroactive damages. Having failed twice to convince the Commission that section 204(a)(3) does not mean what it says, AT&T now asks the Commission to rewrite the law through forbearance. But forbearance in this context that would be completely antithetical to the pro-competitive, deregulatory framework envisioned by the 1996 Act.

Section 204(a)(3) is a deregulatory provision, a provision that reduces the burdens of the tariffing process on the carriers subject to it. It does so in two ways: by shortening notice periods for tariff filings, and reducing the uncertainty associated with tariff filings that are allowed to take effect without investigation.

To ask the Commission to forbear from statutory language that has engendered greater certainty regarding rates, and minimized litigation would not only prove regressive, but would turn Section 10 on its head. As the language of Section 10 confirms, Congress intended for Section 10 to be used as a *deregulatory* tool. It speaks of eliminating rules that are *not necessary*, not eliminating deregulatory measures that go too far. As such, it was an integral part of a statute, the central purpose of which was to establish a "pro-competitive, deregulatory

national policy framework."[5] As Senator Larry Pressler (R.S.D) noted, in addressing the forbearance concept contained in S.652, which was ultimately transformed into the 1996 Act, stating:

> S.652 also ensures that regulations applicable to the telecommunications industry remain current and necessary in light of changes in the industry. First, the legislation permits the FCC to forbear from regulating carriers when forbearance is in the public interest. This will allow the FCC to *reduce* the regulatory burdens on a carrier when competition develops, or when the FCC determines that *relaxed* regulation is in the public interest.[6]

Forbearance from the "deemed lawful" language would have the opposite effect. It would require the Commission to increase regulatory burdens for carriers. It also could reduce innovation and reduce competitive offerings for consumers. Congress did not intend for Section 10 to be used in such a manner.

But even if Section 10 could be used to increase regulation, AT&T has not even come close to satisfying the statutory criteria to warrant such relief. Under that statutory provision, AT&T must demonstrate that enforcement of the deemed lawful provision is unnecessary to ensure that rates and practices are just and reasonable, that enforcement of the provision is unnecessary to protect consumers, and that forbearance is consistent with the public interest. AT&T has failed to satisfy any of these criteria.[7]

Completely absent from AT&T's Petition is any evidence that LEC rates that have been deemed lawful are, in fact, unreasonable. Given this absence, there is no basis to conclude that enforcement of the deemed lawful provisions in any way contribute to rates that are unreasonable.

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[5] Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess.113 (1996).

[6] 141 Cong. Rec. S7886 (daily ed. June 7, 1995) (remarks of Sen. Pressler) (emphasis added).

[7] 47 U.S.C. sec. 10(a-c).

The only evidence AT&T submits in support of its petition are ostensible rates of return of a handful of non-price cap LECs. But wholly apart from the fact that such LECs account for a tiny minority of access lines in the country, rates of return say nothing about the application of Section 204(a)(3) .[8] Without specific, concrete evidence of unreasonable rates, the Commission cannot find that LECs, as a class of carriers, are abusing the deemed lawful provision or that enforcement of Section 204(a)(3) is not working to ensure that LEC tariffed rates are reasonable. Nor has AT&T satisfied the public interest showing criterion. AT&T claims that forbearance would produce pro-competitive benefits, but has in no way supported this bald assertion. In an attempt to temper the impact of the forbearance relief, AT&T asserts that forbearance from the deemed lawful provision would have a minimal effect on carriers because they could continue to file their tariffs on a streamlined basis. But AT&T would still subject carriers that must file tariffs to the uncertainty that section 204(a)(3) was intended to eliminate.

The potential for liability for refunds is an important consideration for every carrier. Many LECs, including SBC, rely heavily on FCC and industry feedback regarding the reasonableness of their rates. Without deemed lawful status, SBC could consider it too risky to introduce certain service offerings into the marketplace, particularly where those offerings propose novel rate structures, terms and conditions. The end result would be less competitive offerings to the detriment of customers, not to mention increased federal oversight, increased regulatory burdens for carriers and increased litigation regarding the reasonableness of carrier rates and practices. These outcomes are wholly inconsistent with the public interest and the deregulatory, pro-competitive purpose of Section 10. AT&T's Petition should therefore be rejected.

[8] In fact, as SBC demonstrated in its Opposition to AT&T's Petition to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, rates of return cannot be used to measure market power, nor are they an accurate measure of profitability. Opposition of SBC Communications Inc., AT&T Corp. Petition to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM No. 10593, 19-22 (Dec. 2, 2002). In any event, for the year 2002, SBC's rate-of-return for transport and switched access services was -3.00%.

III. CONTRARY TO AT&T'S CLAIMS, THE EXISTING TARIFFING REGIME IS SUFFICIENT TO SAFEGUARD CARRIER AND CONSUMER INTERESTS.

Despite AT&T's arguments to the contrary, the Commission's existing tariff regime is more than adequate to protect consumer interests. AT&T argues that the pre-effective and post-effective review mechanisms are inadequate because they allow the LECs to abuse the deemed lawful provision without any legal consequence. Specifically, AT&T claims that because the Section 204(a)(3) process only provides the FCC a 7 or 15-day window to suspend a filed tariff, most tariffs are filed under the streamlined process to achieve deemed lawful status. And given the expedited review period, AT&T claims that few tariffs are suspended and investigated under Section 204, resulting in the proliferation of unreasonable rates in the marketplace. Further, AT&T asserts that the Section 208 process is meaningless because customers are precluded from seeking damages for deemed lawful rates.

Rhetoric aside, though, AT&T presents no evidence to support these allegations. The filing of multiple tariffs pursuant to Section 204(a)(3) is in no way indicative of LEC abuse of the deemed lawful provisions. If anything, filing on 7 or 15-days notice, rather then 1-days notice, is more beneficial to customers because they have an opportunity to object prior to the effective date of the tariff. In any event, AT&T is simply wrong that all major ILECs file their tariffs pursuant to the 7 or 15-day streamlined periods available under Section 204(a)(3). SBC, for example, filed approximately half of its tariffs between September and December on 15-days notice, with the remaining tariffs filed on 1-days notice. SBC is thus not using the Section 204(a)(3) process in an unreasonable manner as AT&T claims, but availing itself of the streamlined process as well as the 1-day filing flexibility available under the FCC's rules.

But even where LECs choose to file more of their tariffs pursuant to Section 204(a)(3), the 7 or 15-day review period is more than sufficient time for the Commission and industry to review these filings. AT&T ignores a critical fact. A significant number of LEC streamlined filings involve rate changes to existing services. For SBC in particular, the overwhelming majority of its 15-day filings involve rate changes (both increases and decreases) and/or changes

to terms for *existing* services. Thus in SBC's case, carriers as well as the Commission frequently are not reviewing new service offerings, but changes to service offerings that have been in effect for months and even years in many instances.[9] Fifteen days, accordingly, is more than adequate time to permit the industry and FCC to review such tariff filings.

Further, the 7 or 15-day review period cannot be viewed in isolation. As AT&T is well aware, many LECs socialize their streamlined filings with FCC staff in advance of the filing date where potential industry challenges are foreseeable. SBC, in fact, socializes it streamlined filings with the Commission in practically every instance where it seeks to introduce novel or complex rates, terms and conditions into its tariffs. In some instances, SBC even socializes proposed tariff offerings with potential customers to get their reaction and feedback prior to filing. These added reviews allow SBC to resolve concerns regarding potential unreasonable rates or practices even before the industry has an opportunity to review.[10] While FCC staff cannot compel LECs to engage in such socialization, the fact is many carriers do, and such review has proven instrumental in identifying and resolving public interest concerns regarding SBC's rates.

Likewise, AT&T cannot ignore the fact that LECs and opposing parties often engage in extensive discussions during the 15-day window to resolve customer concerns regarding proposed tariffed rates or practices. AT&T, for example, has challenged a number of SBC 15-day tariff filings since 1996. In such instances, FCC staff typically advises SBC to resolve the issue with AT&T. In some instances, SBC has been successful, in others SBC has not fared as well, resulting in SBC ultimately withdrawing its tariff.[11] Thus the fact that many LEC tariffs

[9] Moreover, for price cap LECs such as SBC, price cap regulation effectively constrains their ability to charge unreasonably high rates for existing services. Any increase in rates for these services must be offset by reductions in other services to keep revenues under the price cap.

[10] For example, because of FCC concerns, SBC, on behalf of Southwestern Bell Telephone Company, withdrew Transmittals 2906, 2946 and 2969 prior to their effective dates.

[11] For example, SBC, on behalf of Southwestern Bell Telephone Company, withdrew Transmittals 2924 and 2908 because of industry opposition.

filed on 15-days notice have not been suspended or investigated does not mean the tariff review process is ineffective, as AT&T claims. SBC has taken great efforts to ensure that its rates, terms and conditions are reasonable, thereby *eliminating* the need for suspension or investigation.

AT&T likely will argue that the foregoing additional review processes are not compelled by the statute nor utilized by all LECs and thus are not dispositive. But for carriers such as SBC that, as a general practice, engage in such additional review processes to ensure the reasonableness of their rates, these activities seriously undermine AT&T's assertions that they are abusing the Section 204(a)(3) deemed lawful provision.

The reality here is AT&T has not identified one tariff to support its assertion that LEC filings are so complex that AT&T — who has decades of experience in reviewing tariffed offerings and seemingly endless resources to file frivolous petitions such as this — is incapable of adequate review of such filings within the pre-effective period. Likewise, AT&T has not provided evidence that any particular LEC's deemed lawful rates are unreasonable. Thus SBC can only conclude that AT&T has chosen not to fully avail itself of the pre-effective review period to protect itself against the *allegedly* unreasonable rates.

Further, AT&T has not demonstrated that the Section 208 process is ineffective to address its concerns. AT&T in fact admits that it has elected not to utilize the Section 208 process because it believes it to be a "toothless mechanism to protect access customers."[12] In SBC's experience, it has been able to resolve many disputes with customers regarding its tariffed rates and conditions in the early stages of the Section 208 process. The mere potential of protracted litigation is not sufficient to excuse a carrier from taking steps to protect itself against unreasonable rates, and certainly is not sufficient to warrant the Commission taking the extraordinary step of forbearing from deregulatory, pro-competitive provisions of the Act.

[12] AT&T Corporation Petition Pursuant to 47 U.S.C. Section 160 (c) of the Communications Act for Forbearance from Enforcement of Section 204(a)(3) of the Communications Act, As Amended, CC Docket No. 03-256, at 16 (December 3, 2003).

Moreover AT&T cannot view the Section 208 process in isolation. The pre-effective and post-effective review mechanisms work in tandem to protect customers. On the front end, Section 204(a)(3) affords customers the opportunity to review and object to any streamlined filings prior to their effective date. And where a customer later determines that deemed lawful rates are unreasonable, Section 208 enables customers to challenge the rates and compels the FCC to expeditiously adjudicate the claim. Together, these remedies strike a careful balance between a carrier and customer's need for certainty regarding the reasonableness of tariffed rates.

Given the lack of evidence in this proceeding and AT&T's failure to take advantage of the pre-effective and post-effective statutory remedies, SBC must question AT&T's motives here. SBC finds it quite interesting that AT&T challenges the reasonableness of LEC deemed lawful tariffs, but not LEC rates filed on 1-days notice. AT&T clearly would be in a position to recover damages for rates that lack deemed lawful status to the extent any such rates were found to be unreasonable. Unquestionably, a significant number of tariffs are filed on 1-days notice, many of which contain innovative service offerings with novel rate structures, terms and conditions. Given that such offerings contribute significantly to the *allegedly* high LEC profits claimed by AT&T, one would expect AT&T to have challenged the legitimacy of at least some of these offerings. AT&T appears not to have done so, thus further undermining its claims that tariffed rates that were subject to FCC and industry review are unreasonable.

IV. CONCLUSION

For the foregoing reasons, SBC asks that the Commission deny AT&T's request for forbearance relief.

Respectfully Submitted,

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